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NO. 82-1893

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1982

GREGORY R. CLARK, a minor, by and through his next best friend, Guardian ad Litem and natural Guardian, DOUGLAS H. CLARK, JR., and KEVIN KINERK, a minor, by and through his next best friend, Guardian ad Litem and natural Guardian, BURTON KINERK, individually and on behalf of all males similarly situated in the State of Arizona,

Petitioners,

vs.

THE ARIZONA INTERSCHOLASTIC ASSOCIATION, an Arizona corporation, and TONY KOMADINA, Executive Director, individually and in his corporate capacity,

Respondents.

==========

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

==========

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Attorneys for Respondents

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QUESTION PRESENTED

May Respondents, consistent with the requirements of the equal protection clause of the Fourteenth Amendment to the United States Constitution, exclude males from competing on female interscholastic volleyball teams in Arizona in order to provide females with increased athletic opportunities and to redress past discrimination against females in high school interscholastic athletics?

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NO. 82-1893

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Respondents, Arizona Interscholastic Association and Tony Komadina, respectfully request that this Court deny the Petition for

Writ of Certiorari seeking review of the Ninth Circuit's decision in this case.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported in 695 F.2d 1126 (9th Cir. 1983).

RESPONDENTS' SUPPLEMENTAL STATEMENT OF FACTS AND OF THE CASE

On pages 3 through 7 of their Petition for Writ of Certiorari,[1] Petitioners[2] set forth in general the facts and procedural history of the case. Respondents Arizona Interscholastic Association and Tony Komadina[3]

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[1]References in this Response to Petitioners' Petition will be designated "Pet. at ___."

[2]In their Petition to this Court, Petitioners are referenced as "Plaintiffs." They will be referenced herein as "Petitioners."

[3]Respondents Arizona Interscholastic Association and Tony Komadina will be referred to herein as "Respondents" or the "AIA". They are referenced in the Petition as "Defendants." The AIA has no parent companies or subsidiaries. The AIA is affiliated with the National Federation of State High School Associations.

deem it necessary, however, to supplement Petitioners' Statement of the Case with the following:

1. On October 19, 1981, at a meeting of the Executive Board of the AIA, the following resolution was passed:

> "The Executive Board was asked to interpret the Volleyball rules and the Non-Discrimination Policy of the Arizona Interscholastic Association in relationship to the Clark v. A.I.A. court case which is being heard in U.S. District Court in Tucson. The Executive Board determined:
>
> 1. That the current rules regarding volleyball apply to girls only, that there is no provision in the current rules for boys [sic] volleyball, and that only girls may compete on a girls [sic] volleyball team;
>
> 2. That the present rules regarding volleyball are silent as to whether or not boys [sic] volleyball is permitted, and that should sufficient interest on the part of A.I.A. members be evidenced so that the Legislative Council finds it desirable to prepare rules for and sanction interscholastic competition in volleyball for boys, that such action would certainly be permissible under the current Constitution and Bylaws of the A.I.A.;

> 3. That the nondiscrimination policy of the A.I.A. permits participation by girls on boys [sic] teams in non-contact sports in order to compensate for the girls [sic] historical lack of opportunity in interscholastic athletics, however, boys are not allowed to play on girls [sic] teams in non-contact sports since boys historically have had ample opportunity for participation and currently have available to them sufficient avenues for interscholastic participation, and since to allow boys to play on girls [sic] teams in non-contact sports would displace girls from those teams and further limit their opportunities for participation in interscholastic athletics.

Contrary to the suggestion on page 4 of the Petition, the resolution of October 19, 1981, set out above did not modify the AIA's position concerning discrimination in athletics. The policy of the AIA since at least October 1975 has been to strive to provide equal overall athletic opportunities for male and female athletes, as that policy is described and regulated by Title IX of the Equal Education Amendments of 1972, 20 U.S.C. § 1687, et seq. (hereinafter "Title IX").

This desire to offer equal overall athletic opportunities, combined with ample evidence of historical discrimination against females in interscholastic athletics, led the members of the AIA to conclude that equal opportunities for female athletes in non-contact sports could best be obtained if certain sports were reserved for females.

2. On page 3 of their Petition, Petitioners note that there are no male interscholastic volleyball teams in Arizona. The AIA, however, does not prohibit the establishment of male interscholastic volleyball teams. As Paragraph 2 of the Resolution quoted above indicates, the member schools, not the AIA, determine which combination of sports programs best serve their students in light of budget considerations and student interest.

3. On page 6 of their Petition, Petitioners make the following allegation:

> It should be noted that there is nothing in the record to support the proposition that past discrimination against female interscholastic athletics has not been remedied or how denying males the opportunity to compete on some basis on a school's volleyball team will operate to deny females an opportunity to engage in interscholastic athletics.

The above allegation is untrue and is evidence of Petitioners' apparent desire to relitigate in this Court the factual findings made by the trial court, all of which are amply supported by the record. Numerous witnesses testified at the preliminary injunction that the effects of past discrimination against females in interscholastic athletics have not been eradicated. These witnesses also testified that allowing males to compete on female volleyball teams would limit female interscholastic athletic opportunities. Testimony to this effect is

also contained in stipulated facts[4] presented to the trial court. See Pet., Appendix D at 18-9 [First Set of Stipulated Facts - No.'s 37 and 38]; Appendix D at 7-9 [Second Set of Stipulated Facts, No.'s 15-7].

In addition to the testimony from witnesses concerning male participation on female volleyball teams, the AIA presented statistics and stipulated facts to demonstrate the historical inequality of opportunity in Arizona for female athletes. See, e.g., Pet., Appendix D at 5-6 [Supplemental Third Set of Stipulated Facts, No.'s 6-10]. For example, in the 1976-77 school year, there were 33,329 male participants in interscholastic sports in Arizona and 9,109 female participants. By the school year 1979-1980, these numbers had

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[4]The parties agreed that the District Court could render final judgment based on three sets of stipulated facts (see Pet., Appendix D), and the testimony and exhibits received at the preliminary injunction hearing.

increased to 40,240 male participants and 18,793 female participants. Thus the number of male participants increased by slightly more than 20% while female participants increased by slightly more than 100%. Despite the greater increased in female participation, however, there were still more than twice as many male as female participants.

Comparable statistics were offered in relation to fall sports, which for females includes volleyball. During the 1976-1977 school year, 3,616 females and 12,690 males participated in fall interscholastic sports in Arizona. In 1979-1980, 6,055 females and 14,991 males participated in fall sports. Female participation in fall interscholastic sports thus increased by approximatly 67% in this three-year period while male participation increased approximately 18%. Again, however, despite the greater increases in participation by female participants, there

were still more than twice as many males as females participating in fall sports. Thus, as Respondent Tony Komadina, Executive Director of the AIA, testified before the trial court, while the gap is narrowing, there are still substantial inequities to be corrected. See also Pet., Appendix D at 7-8 [Second Set of Stipulated Facts, No.'s 15-6].

Petitioners' suggestion throughout their Petition, (Pet. at 6,10,12), that there is no evidence of the effects of past discrimination is simply untrue. Their attempt to reargue the facts of this case before this Court in itself demonstrates that the Petition should be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

In an attempt to convince this Court that important and special reasons are present which require review by writ of certiorari of the Ninth Circuit's decision, Petitioners allege that the Ninth Circuit's decision conflicts with decisions of this Court, and decisions of other federal and state courts. When these arguments are analyzed, however, it is apparent that there are no special or important, much less substantial, reasons indicating that review by this Court is either necessary or appropriate.

A. The Ninth Circuit's Decision Below is Not in Conflict with Prior Decisions of this Court.

Petitioners argue that the Ninth Circuit's opinion in this case is contrary to prior decisions of this Court. Pet. at 8-12. In so arguing, Petitioners cite and discuss numerous decisions of this Court. They fail,

however, to indicate precisely in what respect the Ninth Circuit's opinion conflicts with any decision of this Court. Even a cursory review reveals that no conflict exists.

Petitioners cite the recent case of Mississippi University for Women v. Hogan, 454 U.S. 962, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982), for the proposition that a state enforced policy of sexual discrimination will be struck down when its supposed compensatory objective is without factual justification. Pet. at 8. The AIA's policy in this case, however, is amply supported by both facts and reason. The classification does not "reflect archaic and overbroad generalizations", Schlesinger v. Ballard, 419 U.S. 498, 508 (1975), or "old notions" of differences between the sexes. Stanton v. Stanton, 421 U.S. 7, 14 (1975). Rather, the AIA's policy is substantially related to its compensatory

objective of promoting female interscholastic opportunities.

In Hogan, supra, this Court held that a state supported university's policy of excluding males from enrolling in professional nursing school violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. This Court recognized, however, that a gender-based classification favoring one sex could be justified if it intentionally and directly assisted members of the sex that are disproportionately burdened. 454 U.S. at _____, 102 S.Ct. at 3338, 73 L.Ed.2d at 1100. This Court cited Califano v. Webster, 430 U.S. 313 (1977), and Schlesinger v. Ballard, 419 U.S. 498 (1975), as examples of cases where otherwise discriminatory classifications were upheld on the basis that members of one sex suffered a disadvantage in relation to the classification. In Hogan,

supra, the State of Mississippi made no showing that women lacked opportunities to obtain training in the field of nursing, either presently or historically. Rather than compensate for discriminatory barriers, Mississippi University's policy of excluding males from nursing tended to perpetuate the stereotypical view of nursing as a female profession. 454 U.S. ____, 102 S.Ct. at 3339, 73 L.Ed.2d at 1101-2. In contrast, in the present action the stereotypical view and historical practice is that males rather than females participate in athletics. The AIA's policy assists in eliminating, rather than furthering, this improper stereotypical view. This Court's opinion in Mississippi University for Women v. Hogan, supra, supports in all respects the Ninth Circuit's decision in this action.

Petitioners also argue that "[t]he Ninth Circuit never addressed the proposition

established in Wengler v. Druggist Mutual Insurance Company, 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980), that the group promulgating the gender-based discriminatory policy must prove the policy is substantially related to its compensatory objective." Pet. at 10-11. The Ninth Circuit, however, did not ignore this directive. The AIA clearly proved that its policy was and is substantially related to the objective of overcoming the continued effects of past discrimination against females in interscholastic athletics. Petitioners' recurrent suggestion that there simply is no factual evidence of the effects of past discrimination, Pet. at 6,10,12, is incorrect and evidences the futility of their argument.

B. The Ninth Circuit's Opinion is Not in Conflict With Decisions of Other Federal Courts or State Courts of Last Resort.

Petitioners argue at pages 13 through 19 of their Petition that the Ninth Circuit's

opinion is in conflict with decisions of other state and federal courts. The cases cited by Petitioners, however, do not reveal any conflict with the Ninth Circuit's decision in this case.

Petitioners discuss numerous cases which involved attempts by females to gain access to male athletic programs. Pet. at 14-6. For example, in Brendon v. Independent School District 742, 477 F.2d 1292 (8th Cir. 1973), the court allowed females to compete on male tennis, cross country, skiing and running teams in order to increase the athletic opportunities available to females. The District Court in Yellow Springs Board of Education v. Ohio School Athletic Association, 443 F. Supp. 753 (S.D. Ohio 1978), rev'd on other grounds, 647 F.2d 651 (6th Cir. 1981), held that girls must be given the opportunity to compete with boys in interscholastic contact sports. In Hoover v. Meiklejohn, 430

F. Supp. 164 (D. Colo. 1977), the court permitted a girl to compete on the boys' high school soccer team.

Respondents have no quarrel with the above cases insofar as they guarantee a female athlete's right of access to the full range of public high school athletic programs, especially since females historically have suffered discrimination in athletic opportunities. It is incorrect, however, to suggest that these cases stand for the proposition that male students, while being provided ample overall athletic opportunities, may not be denied access to a particular female sport. Denying to males the opportunity to participate on female volleyball teams is permissible not only because of the historical inequities, but also because males possess different physical attributes than females. These objective physical differences provide males an

objective advantage in two of the six main skills in volleyball. See Pet., Appendix D, at 9 [Second Set of Stipulated Facts, No. 18]. As the court noted in Hoover v. Meiklejohn, supra:

> Given the lack of athletic opportunity for females in past years, the encouragement of female involvement in sports is a legitimate objective and separation of teams (by sex) may promote that purpose. [citations omitted] It may also justify the sanction of some sports only for females, of which volleyball may be an example. 430 F. Supp. at 170.

Courts have regularly rejected attempts by males to participate on female interscholastic teams. See, Forte v. Board of Education, 105 Misc. 2d 36, 431 N.Y. Supp. 2d 321 (1980) (resolution enacted by state public high school association prohibiting participation of male students on female interscholastic volleyball teams consistent with state law and regulations, and approved as permissible means of regressing the disparate

treatment female students have historically received in interscholastic athletics); Mularadelis v. Haldane Central School Board, 74 A.D.2d 248, 427 N.Y. Supp. 2d 458 (1980) (school board's decision denying to a male student the opportunity to play on the school all-female tennis team held not to violate Title IX, due process or equal protection).

Petrie v. Illinois High School Association, 75 Ill. App. 3d 980, 394 N.E.2d 855 (1979), involved a situation which cannot be distinguished from the facts present in the instant case. The court in Petrie, supra, recognized that differences in physical stature and previous athletic opportunities were sufficient reasons to deny to males the opportunity to play on interscholastic female volleyball teams. The Petrie court's decision considered not only the equal protection clause of the United States Constitution, but the Illinois State Equal Rights Amendment,

which required a strict scrutiny analysis for sex-based classifications. The Petrie court found that the Illinois Athletic Association had a compelling state interest in developing female interscholastic athletics.

Petitioners rely heavily on the case of Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (D. R.I.), vacated as moot, 604 F.2d 733 (1st Cir. 1979). It should first be noted that the Gomes decision in the District Court was not based upon constitutional grounds. Rather, the court found that 45 C.F.R. § 86.41, adopted by the then Department of Health, Education and Welfare to implement Title IX, required a sport-by-sport analysis of whether members of one sex traditionally had been denied athletic opportunities. The case before this Court does not involve an interpretation of these regulations or Title IX. Nevertheless, Respondents submit that the court in Gomes was

incorrect in applying a test which would require equal opportunities in every sport rather than an examination of the overall athletic program. On appeal, the Department of Justice, representing the then Department of Health, Education and Welfare, submitted an amicus brief stating its position that the trial court incorrectly interpreted the regulations. See, Gomes v. Rhode Island Interscholastic League, 604 F.2d at 735, fn. 3. This issue was never addressed because the case was vacated as moot by the First Circuit Court of Appeals.

Petitioners' reliance on Attorney General v. Massachusetts Interscholastic Athletic Association, 393 N.E.2d 284 (1979), is also misplaced. In Massachusetts Interscholastic, supra, the court held that a rule of the Massachusetts Interscholastic Athletic Association that no boy could play on any girls' team violated the Massachusetts Equal

Rights Amendment, a Massachusetts statute prohibiting sex discrimination, and regulations promulgated pursuant to the statute. The statute and the Massachusetts Equal Rights Amendment, however, required a level of scrutiny greater than that required by the United States Constitution. The court made numerous references to this fact in rendering its decision. See, Massachusetts Interscholastic, 393 N.E.2d at 286 fn. 5, 289, and 291.

The Massachusetts Interscholastic case also involved an across-the-board prohibition against boys' participation on any girls' sport without an independent determination of the reasonableness of such a rule with respect to any particular sport. The court distinguished Petrie v. Illinois High School Association, supra, on this basis and wrote:

> That ruling [in Petrie] like Gomes, was confined to the particular situation; it was not concerned with the validity of a general ban. 393 N.E.2d at 290, fn. 25.

The court further stated:

> Classification on strict grounds of sex, without reference to actual skill differentials in particular sports, would merely echo "archaic and overbroad generalizations." [Emphasis added] 393 N.E.2d at 293.

In the case presented to this Court, a clear factual showing was made with respect to skill differentials for hitting and blocking in volleyball based upon the objective physical differences between males and females. Pet., Appendix D at 9 [Second Set of Stipulated Facts, No. 18]. This showing simply was not made in the Massachusetts Interscholastic Association case.

As the above cases demonstrate, the Ninth Circuit's decision is in agreement, rather than in conflict, with the decisions of other courts that have considered the issue presented in this case. There is no need or reason for review by this Court.

C. The Federal Question Decided by the Ninth Circuit in this Case Does Not Present Important or Substantial Issues Which Merit Review by this Court.

Petitioners conclude their Petition by arguing that the questions presented in the Ninth Circuit's opinion are of sufficient importance to merit review by this Court. Such is clearly not the case. In making this argument, Petitioners suggest that this Court should address the question of "how long eligible males can be systematically excluded from a specific athletic program solely on the basis of their sex in order to remedy past discrimination against female athletes . . ." Pet. at 21. The question of when the effects of past discrimination against female athletes in Arizona will be eradicated, however, must be determined on a case-by-case basis after careful consideration of the relevant facts. This issue is not before the Court, and was not litigated before the trial court.

Petitioners' suggestion that the AIA rule has "no current functional use," Pet. at 21, is a misstatement of the evidence presented to the district court and to this Court, and is an attempt by Petitioners to find an issue, not actually present in the case, which might merit review.

CONCLUSION

Based on the above, Respondents request that the Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit's decision in this case.

RESPECTFULLY SUBMITTED this 9th day of June, 1983.

DeCONCINI McDONALD BRAMMER
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By John C. Richardson
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Attorneys for Respondents

CERTIFICATE OF SERVICE BY MAIL

I am a citizen of the United States and employed in the County of Pima, State of Arizona, in the offices of DeConcini McDonald Brammer Yetwin & Lacy, P.C., and am a member of the bar of this Court. My business address is 240 North Stone Avenue, Tucson, Arizona 85701. On June 9, 1983, I served the following:

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

by placing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in a United States Post Office mail box at Tucson, Arizona, addressed as follows, in accordance with Rule 28 of the Rules of the United States Supreme Court:

Douglas H. Clark, Jr., Esq.
Jonathan Rothschild, Esq.
Mesch, Clark & Rothschild, P.C.
259 North Meyer Avenue
Tucson, Arizona 85701
Attorneys for Petitioners

and by placing the original and forty copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in a United States Post Office mail box at Tucson, Arizona, addressed as follows, in accordance with Rule 28 of the Rules of the United States Supreme Court:

Alexander Stevas
Clerk of the United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Executed on June 9, 1983, at Tucson, Arizona. I certify under penalty of perjury that the foregoing is true and correct.

DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.

By John C. Richardson
John C. Richardson
240 North Stone Avenue
Tucson, Arizona 85701
Attorneys for Respondents